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In The Supreme Court of the United States

SCOTT ZAHN,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

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PETITION FOR *WRIT* OF *CERTIORARI*

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the sender of a package forfeits any expectation of privacy protected by the Fourth Amendment in that package when the package bears a fictitious name as the sender?

2. Whether the State of Michigan may, consistent with the Due Process Clause of U.S. Const. amend. XIV, assert jurisdiction over the Petitioner and try him for a criminal offense on the basis of actions taken wholly within the State of Florida which did not cause any adverse effects within the State of Michigan.

3. Whether a prosecution of the Petitioner in the State of Michigan is barred by the Due Process Clause of U.S. Const. amend. XIV because any basis for the exercise of jurisdiction by the State of Michigan was manufactured and created by state officers.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of this case contains the names of all parties to the proceedings before the Michigan Supreme Court.

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5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3 (3d ed. 1996) 9, 16

OPINIONS BELOW

The Order/Opinion Granting Defendant's Motion to Dismiss and Suppress Evidence of the Circuit Court for the County of Genesee, Michigan, entered January 9, 1998, is not reported but is set forth in the Appendix beginning at A-1. The Opinion and Order of the Court of Appeals of Michigan reversing the Circuit Court's order to suppress evidence and dismiss and remanding for trial is reported in *People v. Zahn*, 234 Mich. App. 438, 594 N.W.2d 120 (1999), and is set forth in the Appendix beginning at A-24. The summary order of the Michigan Supreme Court entered September 28, 1999, denying the Petitioner leave to appeal from this ruling is reported in *People v. Zahn*, 461 Mich. 872 (1999), and is set forth in the Appendix at A-39.

The Order of the Circuit Court of the County of Genesee, Michigan, denying the Petitioner's motion for reconsideration is not reported and is set forth in the Appendix beginning at A-41. The Order of the Court of Appeals of Michigan entered March 2, 2000, denying the Petitioner leave to appeal from this ruling is not reported and is set forth in the Appendix at A-43. The Order of the Michigan Supreme Court entered July 18, 2000, denying leave to appeal from this order is reported in *People v. Zahn*, 462 Mich. 918 (2000), and is set forth in the Appendix at A-45.

The Order of the Court of Appeals of the State of Michigan, entered January 29, 2001, denying the Petitioner leave to appeal from the final order of conviction and sentence is not reported and is set forth in the Appendix at A-57. The

Order of the Michigan Supreme Court, entered September 25, 2001, denying the Petitioner leave to appeal the decision of the Court of Appeals is not reported, and is set forth in the Appendix at A-58.

STATEMENT OF JURISDICTION

The Order of the Michigan Supreme Court denying the Petitioner's application for leave to appeal was entered on September 25, 2001 (A-58). This Court has jurisdiction to review the judgment entered in the courts of the State of Michigan under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IV provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

> are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The instant case is a criminal action in which the Petitioner, Scott Zahn, was charged with delivery of between 225 and 650 grams of cocaine in violation of Mich. Comp. Laws § 333.7401(2)(a)(ii). The charges stemmed from an investigation by the Flint Area Narcotics Group (FANG), which enlisted the aid of James Hall. Hall had known the Petitioner for 30 years. On February 18, 1997, Hall called a telephone number that he knew from prior use to be the Petitioner's. After leaving a message, Hall received a return call from a person whose voice he recognized as the Petitioner's. Hall asked to "do lunch," which were code words he and the Petitioner had used previously when discussing cocaine sales. The Petitioner asked for a $3,000 down payment to be sent to him, and Hall said that the Petitioner should use the same address in Sunrise, Florida, that they had used previously. Hall called the same telephone number the next day and spoke with a person whose voice he recognized as the Petitioner's. Hall confirmed the deal and said that he would send the money.

Hall sent $3,000 provided to him by Flint Police Sergeant Alan McLeod, and on the following Monday Hall had a telephone conversation with a person whom he recognized as the Petitioner by voice; the Petitioner told Hall that Hall would have his "lunch" by Tuesday morning. Hall knew that the package to be sent by the Petitioner would be sent to 2220 East Court Street, Apartment 2, in Flint and that the name of the addressee on the package would be "Hoelzer" because this was the address and name that Hall and the Petitioner had used before.

Sergeant McLeod of FANG testified that he was conducting surveillance of the apartments at 2220 East Court Street in Flint on February 25, 1997 when he saw a Federal Express delivery truck come to that address. McLeod took possession of a package from the delivery person and saw that it was addressed to a Jane Hoelzer at 2220 East Court Street, Apartment 2, in Flint. The sender was shown as John Hoelzer in Hollywood, Florida. McLeod opened the package and found a brown paper bag with red handles. The bag was wrapped tightly around Tupperware, which contained a Ziplock bag, which in turn contained a substance he suspected, and eventually proved, to be cocaine. McLeod then received a warrant for the Petitioner's arrest and went to Florida to execute the warrant.

On February 27, McLeod joined with other officers in an attempt to deliver the balance due from Hall. McLeod watched as another officer, posing as a Federal Express employee, delivered a package containing $6,000 to an apartment in Summer Breeze, Florida. A female answered the

disguised officer's knock and took and signed for the package. Fifteen to thirty minutes later, McLeod and the other officers saw a female exit the apartment and begin to leave in a minivan; McLeod stopped her, asked for her identification, and received a driver's license in the name of Barbara Zahn. McLeod and the other officers then entered the apartment in order to speak with its other occupant, Carolyn Kelly. The Petitioner arrived at the apartment shortly thereafter.

McLeod identified himself to the Petitioner as a Michigan law enforcement officer and advised the Petitioner that they were there to investigate the money which had been sent. Shortly thereafter, the Petitioner was arrested in Florida, waived extradition and returned to Michigan to stand trial.

The Petitioner filed a pretrial motion to dismiss for lack of jurisdiction, to suppress evidence seized by police on February 25, 1997 from a package sent by the Petitioner, to suppress statements made by the Petitioner to police in Florida on February 27, 1997, and to suppress evidence seized from the Petitioner's car in Florida on February 27, 1997. The pretrial motion based the motion to suppress upon the provisions of U.S. Const. amend. IV, and the motion to dismiss for lack of jurisdiction upon U.S. Const. amend. XIV. On January 9, 1998, the Circuit Court for the County of Genesee, Michigan, entered an order granting the Petitioner's motion to suppress both the real evidence and the statements and ordered that the case be dismissed, although it denied the Petitioner's motion to dismiss for lack of jurisdiction (A-23). The Respondent, People of the State of Michigan, appealed this order to the Court of Appeals of Michigan.

On March 12, 1999, the Court of Appeals, in a 2-1 decision, rendered its opinion and judgment reversing the suppression order of the Circuit Court. *People v. Zahn*, 234 Mich. App. 438, 594 N.W.2d 120 (1999) (A-24). The Court of Appeals recognized that both the sender and the recipient of a package have a legitimate expectation of privacy in the package, but it held that a "sender's legitimate expectation of privacy 'vanishes' when his identity is not indicated on the surface of the package." 594 N.W.2d at 124 (A-30). According to the court, the Petitioner had effectively abandoned the package and so had no standing to challenge the search of it. *Id.* (A-30). The Petitioner's application for leave to appeal this order to the Michigan Supreme Court asserted that suppression was required by U.S. Const. amend. IV, but was denied in an order entered September 28, 1999 (A-39).

After the case was remanded to the Circuit Court, the Petitioner requested that the court reconsider its ruling that there was jurisdiction over the Petitioner and requested dismissal on the additional ground that, assuming jurisdiction existed, it was manufactured by state agents in violation of the constitutional guarantee to due process. The Circuit Court denied reconsideration and the motion to dismiss (A-41). The Petitioner's application to the Court of Appeals of Michigan for leave to appeal these orders, which application asserted that dismissal was required by U.S. Const. amend. XIV, was denied (A-43).

On November 8, 2000, the Petitioner entered a conditional plea of nolo contendere to a charge of violation of Mich. Comp. Laws § 333.7401(2)(a)(iii), it being expressly

stipulated in a plea agreement that the Petitioner was reserving his right to appeal, including his right to petition for writ of certiorari, the denial of his motions to suppress, to dismiss for lack of jurisdiction, and to dismiss because any jurisdiction was manufactured by the state (A-48). On December 5, 2000, the Circuit Court entered a final judgment convicting the Petitioner and sentencing him to a term of imprisonment of between 10 and 20 years (A-50, 51). The Petitioner timely applied with the Court of Appeals of Michigan for leave to appeal the final judgment, which that court denied in a order dated January 29, 2001 (A-57). Petitioner then timely applied for leave to appeal to the Michigan Supreme Court, which application was denied in an order entered September 25, 2001 (A-58). The applications for leave to appeal the final judgment asserted that evidence was seized in violation of the Petitioner's rights under U.S. Const. amend. IV, and that any assertion of jurisdiction over the Petitioner was in violation of the Due Process Clause of U.S. Const. amend. XIV.

ARGUMENT

I. AS THE SENDER OF THE PACKAGE, THE PETITIONER HAD AN EXPECTATION OF PRIVACY IN THAT PACKAGE PROTECTED BY THE UNITED STATES CONSTITUTION AND THAT EXPECTATION WAS NOT LOST BECAUSE HE WAS NOT IDENTIFIED ON THE PACKAGE.

It is clear that the Petitioner, as the sender of the package which was intercepted by Sergeant McLeod,[1] had an expectation of privacy in the package that is protected by the Fourth Amendment to the United States Constitution, which protects persons against unreasonable searches and seizures. To allege a Fourth Amendment violation, an individual must have a legitimate expectation of privacy in the items searched or seized. *Rakas v. Illinois*, 439 U.S. 128 (1978). It is well established that the sender of a letter or a package has an expectation of privacy in that object, which privacy is protected by the Fourth Amendment, at least until final delivery is made:

> It should not be assumed from the fact that the addressee has standing while the goods are en route that this means the sender is without

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[1]The Court of Appeals accepted the Circuit Court's finding that the Petitioner did send the package (A-30). *People v. Zahn*, 234 Mich. App. 438, 594 N.W.2d 120, 124 n.3 (1999).

> standing once he deposits them in the U.S. mails or with a common carrier. This is not the case; the sender has an expectation of privacy with respect to goods he has entrusted to such delivery systems, though it may be otherwise when less conventional means of transferring goods are utilized. The standing of the sender, to the extent it is based solely upon the fact of his being the sender, terminates once delivery of the goods has been made.

5 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 11.3(f), at 205-06 (3d ed. 1996).

Decisions of this Court confirm this principle and the expectation of privacy of the sender of a package by mail or carrier. In *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970), although it was held that the search of a package was not unreasonable, this Court made plain that the detention of a package for the purpose of securing a search warrant implicated the Fourth Amendment rights of the sender of the package. "It has long been held that first-class mail such as letters and sealed packages subject to letter postage . . . is protected from inspection by postal authorities, except in the manner provided by the Fourth Amendment." *Id.* at 251. The decision quoted the opinion in *Ex parte Jackson*, 96 U.S. 727, 733 (1878), where it was held that "[l]etters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, *as if they were retained by the parties forwarding them in their own domiciles*" under the constitutional guarantees set forth in the

Fourth Amendment (emphasis added). Similarly, in *Walter v. United States*, 447 U.S. 649 (1980), this Court rejected the government's argument that a sender's Fourth Amendment rights were not violated when agents viewed the contents of packages after they had been opened by private persons, stating as follows:

> [P]etitioners expected no one except the intended recipient either to open the 12 packages or to project the films. The 12 cartons were securely wrapped and sealed, with no labels or markings to indicate the character of their contents. *There is no reason why the consignor of such a shipment would have any lesser expectation of privacy than the consignor of an ordinary locked suitcase. The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy.* The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of the expectation of all Fourth Amendment protection.

Id. at 658-59 (emphasis added; footnotes omitted).

A sender's expectation of privacy is reflected in lower court opinions as well. In *United States v. Villareal*, 963 F.2d 770, 774 (5th Cir. 1992), the court upheld the suppression of evidence obtained by a warrantless search of a container being

shipped by a common carrier, noting that this Court has long recognized that letters and other sealed effects are effects in which the public at large has a legitimate expectation of privacy, and "[b]oth senders and addressees of packages or other closed containers can reasonably expect that the government will not open them." *See also United States v. Randle*, 966 F.2d 1209, 1213 (7th Cir. 1992) (a person has no expectation of privacy in a package where he is neither the sender nor the addressee).

The Court of Appeals' opinion did not dispute a sender's right to claim a privacy interest in a package, but held that the Petitioner could not claim any privacy interest in the package because it bore a fictitious name as the sender. *People v. Zahn*, 234 Mich. App. 438, 594 N.W.2d 120, 124 (1999) (A-30). This holding was supported by no decision of this Court, and is in conflict with the decision in *Walter v. United States*. *Walter* upheld the ability of a consignor of a package to challenge the validity of a search even though the facts showed that the addressee of the package was fictitious. 447 U.S. at 651 n.1. Nothing in *Walter* indicates that the presence of a false name on the package limited the consignor's ability to assert that the warrantless search was an invasion of his Fourth Amendment rights.

Nor does *Walter* or any other decision of this Court support the Court of Appeals' underlying reasoning that the Petitioner's method of sending the package constituted an abandonment of the package and thereby forfeited any expectation of privacy the Petitioner had in the package. *Zahn*, 594 N.W.2d at 124 (A-30). Whether a person had

abandoned effects or property such that he or she could not claim a violation of his Fourth Amendment rights has rarely been addressed by this Court. In *Hester v. United States*, 265 U.S. 57, 58 (1924), a claim that officers had conducted an unlawful search when they examined and seized whiskey jugs discarded by the appellant as he fled from the officers was rejected because the appellant's own conduct had disclosed the existence of the jugs. This Court also stressed that the jugs had been discarded upon open fields, an area to which Fourth Amendment protections do not extend. *Id.* at 59.

In *Abel v. United States*, 362 U.S. 217 (1960), abandonment was relied upon to uphold a warrantless search of a motel room wastepaper basket after the petitioner had left the room and checked out. Citing *Hester*, the Court wrote as follows:

> The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. . . . So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property.

Id. at 241. By contrast, in *Smith v. Ohio*, 494 U.S. 541 (1990), this Court held that Smith had not abandoned a paper bag or its contents when, upon being approached by police, he tossed the bag upon a car, refused to tell the police what the bag

contained, and then attempted to prevent the police from looking in the bag. This Court held that "a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property." *Id.* at 543-44.

Although the precise reasoning for finding an abandonment in *Hester* and *Abel* on the one hand and no abandonment in *Smith* on the other is not set forth, it is apparent that the distinction lies in the extent to which the person has exposed to view or allowed access to the effect or property thereby forfeiting any expectation of privacy in that property or effect. *Hester* stressed both the fact that the appellant's voluntary conduct had exposed the incriminating evidence to the view of the officers and that the place where the appellant had discarded the jugs was not one where he had a recognized expectation of privacy. In *Abel*, the petitioner had discarded effects in a place which was within the unrestricted control of third persons and where the petitioner no longer had an expectation of privacy. On the other hand, the petitioner in *Smith* had not voluntarily exposed the contents of the bag to public view.

The decision in *California v. Greenwood*, 486 U.S. 35 (1988), also indicates that the key in determining whether there has been an abandonment effecting a forfeiture of an expectation of privacy depends upon the extent to which property is exposed to public view or made accessible to others. *Greenwood* found that no Fourth Amendment violation occurred when police inspected trash set out at the curb for

pick up and disposal because the respondents did not have a legitimate expectation of privacy in that trash:

> Here, we conclude that respondents exposed their garbage to the public sufficiently to defeat their claim to Fourth Amendment protection. It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public.
>
> . . . Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself have sorted through respondents' trash or permitted others, such as the police, to do so. Accordingly, having deposited their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it," *United States v. Reicherter*, 647 F.2d 397, 399 (3d Cir. 1981), respondents could have had no reasonable expectation or privacy in the inculpatory items that they discarded.

Id. at 40-41. This Court held that the police need not avert their eyes from evidence of criminal activity "that could have been observed by any member of the public. Hence, '[w]hat

a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.'" *Id.* at 41 (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)).

If essence of an abandonment of an effect is its exposure to public view or access, then the Court of Appeals' ruling that the Petitioner abandoned the package he sent by failing to include his true name upon the package was clearly erroneous. The fact that a fictitious name is indicated on the package does not indicate that the sender has forfeited his expectation of privacy in that package; the contents are not thereby exposed to public view nor is access generally made available to the package. Although the Court of Appeals held that the Petitioner's failure to include his name on the package severed any expectation of privacy he had in it, it did not explain why a false addressee's name does not similarly divest the recipient of a package or letter of any expectation of privacy in the effect. To the contrary, this Court expressly recognized in *Walter* that the intended recipient of a package bearing a fictitious addressee's name does have an expectation of privacy in the package which is protected by the Fourth Amendment. *See also United States v. Givens*, 733 F.2d 339, 341 n.7 (4th Cir. 1984) (recognizing that *Walter* is authority for the proposition that a package addressed to a fictitious entity may furnish a basis for an expectation of privacy); *United States v. Richards*, 638 F.2d 765, 770 (5th Cir.), *cert. denied*, 454 U.S. 1097 (1981) (intended recipient of package had a constitutionally protected expectation of privacy in the package even though it was addressed to a fictitious entity). If a recipient of a falsely labeled package or letter is not deemed to have lost his

or her expectation of privacy in that property, then a sender who fails to properly identify himself may not be deemed to have surrendered his expectation of privacy in an effect under the rationale of abandonment.

The Court of Appeals' reasoning that an abandonment occurred in this case because the Petitioner failed to identify himself as the sender of the package simply fails to withstand analysis. It wrote that a person's privacy interest "'vanishes' when his identity is not identified on the surface of the package," and that by failing to identify himself the Petitioner essentially "repudiated" any connection with the package. *Zahn*, 594 N.W.2d at 124 (A-30, 31).[2] But this Court has never held that a person must announce his or her interest in a place or property in order to have an expectation of privacy in it which the Fourth Amendment will protect. Indeed, lower courts and commentators point out that the better-reasoned rule is that a mere disclaimer of ownership of property does not deprive a person of standing to assert a violation of his or her Fourth Amendment rights as to that property. 5 LaFave, *supra*, § 11.3(a), at 128-29. "One does not lose the legitimate expectation of privacy in a residence merely by denying an interest therein." *United States v. Vega*, 221 F.3d 789, 797 (5th Cir. 2000). A defendant's "denial of ownership should not defeat his legitimate expectation of privacy in the space invaded and thus his right to contest the search when the

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[2]The Court of Appeals relied primarily upon the decision in *United States v. DiMaggio*, 744 F. Supp. 43, 46 (N.D.N.Y. 1990), for this ruling. But the *DiMaggio* decision similarly failed to cite any ruling of this Court supporting its ruling and at no point referred to the decision in *Walter*.

government at trial calls upon the jury to reject the denial." *United States v. Isaacs*, 708 F.2d 1365, 1368 (9th Cir.), *cert. denied*, 464 U.S. 852 (1983); *see also United States v. Mulligan*, 488 F.2d 732, 737 (9th Cir. 1973), *cert. denied*, 417 U.S. 930 (1974) (the defendant could challenge the search of a car even though he had registered it under a fictitious name because the defendant was its true owner).

The idea that a sender's expectation of privacy in mailed matter "vanishes" if his or her identity is not indicated on that matter, *Zahn*, 594 N.W.2d at 124 (A-30), simply cannot be accepted and must not be allowed to stand. An expectation of privacy protected by the Fourth Amendment arises when a person exhibits a subjective expectation that the property or effects will remain free from public intrusion and that expectation is one which society is prepared to recognize as reasonable. *Rakas*, 439 U.S. at 143 n.12; *Katz*, 389 U.S. at 361 (Harlan, J., concurring). There can be no doubt that the Petitioner here, by securely wrapping the package in opaque material, exhibited a subjective expectation of privacy in the contents of the package. *United States v. DiMaggio*, 744 F. Supp. 43, 45 (N.D.N.Y. 1990).

To accept the view that this expectation of privacy is not reasonable because the Petitioner did not identify himself on the package would open vast amounts of mailed matter to inspection by government agents. It is a common practice for persons to omit their names from any return address listed on a package or letter, but persons certainly do not expect that they would be deemed to have abandoned that package or letter or otherwise forfeited their expectation of privacy in that

effect. Under the Court of Appeals' ruling in this case, any letter or package which does not identify the sender could be opened and searched without any responsibility flowing to the sender. This society and nation surely would, and must if the mail and carrier services are to remain secure and confidential, recognize as reasonable the expectation of privacy a sender has in a package or letter notwithstanding the sender's failure to include his or her identity on that letter or package.

Therefore, the Petitioner had a legitimate expectation of privacy in the package even though the package bore a fictitious name for the sender. Contrary to the Court of Appeals' ruling, there was no abandonment of the package because the Petitioner had not exposed its contents to public view and had not allowed or authorized public access to the package. The Petitioner's privacy interest gave him standing to challenge the warrantless search of the package and the Court of Appeals erred in ruling to the contrary.

The state courts' failure to recognize the Petitioner's standing to assert that the evidence obtained from the package should be suppressed was clearly prejudicial to him. Had the state courts correctly found that the Petitioner's Fourth Amendment rights were implicated by the search, the evidence would have been subject to suppression. The seizure and search of the package was accomplished without a warrant; it was per se unreasonable subject only to the few established and well-delineated exceptions. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). None of the exceptions to the warrant

requirement apply in this case,[3] so the evidence seized should have been suppressed because it was obtained in violation of the Fourth Amendment. It was only because the state courts refused to recognize the Petitioner's expectation of privacy in the package that the Petitioner entered a nolo contendere plea (A-47). He was clearly prejudiced by the erroneous determination that he had no Fourth Amendment interest in the package. This Court should issue a writ of certiorari to correct the error below and decide this important issue concerning the privacy of matter placed in the mail or with private carriers for delivery.

II. THE STATE OF MICHIGAN DID NOT HAVE JURISDICTION TO PROSECUTE THE PETITIONER BECAUSE HE WAS NEVER PRESENT WITHIN MICHIGAN AND HIS CONDUCT CAUSED NO ADVERSE EFFECTS WITHIN MICHIGAN.

In its first decision in this case, the Michigan Court of Appeals recognized that the charges against the Petitioner are based upon the Respondent's allegation that James Hall, who was a friend of the Petitioner but was acting as an agent for the police, telephoned from Michigan to the Petitioner's residence in Florida and arranged to buy some cocaine. *Zahn*, 594 N.W.2d at 120 (A-25). After Hall sent money to the

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[3]Those exceptions include (1) a search incident to an arrest, (2) an automobile search upon probable cause, (3) a plain view seizure, (4) a search pursuant to consent, (5) a stop and frisk, and (6) a search upon exigent circumstances.

Petitioner, it is alleged that the Petitioner sent a package containing cocaine to an address within the City of Flint. However, the package was intercepted by Flint Police Sergeant Alan McLeod, who conducted the warrantless search of the package. The Petitioner was thereafter arrested in Florida pursuant to a Michigan warrant, waived extradition, and returned to Michigan for prosecution under Mich. Comp. Laws § 333.7401(2)(a)(ii). *Zahn*, 594 N.W.2d at 122-23 (A-27).

Even when viewed in a light most favorable to the Respondent, the facts upon which the charge in this case is based show that any and all of the Petitioner's relevant conduct occurred outside the State of Michigan. At no point was the Petitioner physically within the State of Michigan until he waived extradition. Any conduct which forms the basis of the prosecution of the Petitioner occurred in the State of Florida.

It is settled law that a state's exercise of jurisdiction to prosecute a criminal offense extends only to conduct which can be considered to have taken place inside the state. As the court wrote in *People v. Kirby*, 42 Mich. App. 97, 201 N.W.2d 355, 356-57 (1972), "[i]t is a well-established rule that a sovereign state can exercise jurisdiction to punish a criminal offense only when the offense is committed in whole or in part in that sovereign state. . . . No matter how closely an act is connected with the state, if all the criminal elements are done entirely outside a state's boundaries, it cannot be punished by that state."

This Court has held that these limits are imposed under the Due Process Clause of the U.S. Const. amend. XIV. In *Nielsen v. Oregon*, 212 U.S. 315 (1909), a conviction obtained in the State of Oregon was reversed where it was based upon conduct which occurred wholly within the State of Washington. Jurisdiction is the very power to prosecute and punish for particular conduct and "[b]ecause the State only has power to enact and enforce criminal laws within its territorial borders, there can be no criminal offense unless it has territorial jurisdiction." *People v. McLaughlin*, 80 N.Y.2d 466, 606 N.E.2d 1357, 1359 (1992) (citing *Nielsen*).

This Court again addressed the limits of state criminal jurisdiction in *Strassheim v. Daily*, 221 U.S. 280 (1911), a habeas corpus action arising from the prosecution by Michigan of an Illinois resident on the basis of his participation in a scheme to defraud the state in the sale of machinery. The decision held that Michigan could prosecute the Illinois resident even though he never set foot in Michigan if it was found that he had induced a state agent to assist in the execution of a fraudulent scheme within the state. This Court wrote that "[a]cts done outside a jurisdiction, but intended to produce *and producing detrimental effects within it*, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Id.* at 285 (emphasis added).

Strassheim recognizes an exception to the general rule allowing only territorial application of penal laws. As the Michigan court recognized in *People v. Blume*, 443 Mich. 476, 505 N.W.2d 843, 845 (1993):

> The general rule is that jurisdiction is proper only over "offenses as may be committed within its jurisdiction." *People v. Devine*, 185 Mich. 50, 52-53, 151 N.W. 646 (1915). The authority to exercise jurisdiction over acts that occur outside the state's physical borders developed as an exception to the rule against extraterritorial jurisdiction. That exception, however, is "limited to those acts that are intended to have, and that actually do have, a detrimental effect within the state." *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911); *Deur v. Newaygo Sheriff*, 420 Mich. 440, 446-447 362 N.W.2d 698 (1984).

Thus, the narrow exception requires facts showing both that a defendant located outside the state intended his conduct to have a detrimental effect in the prosecuting state *and* that the acts "actually do have[ ] a detrimental effect within the state." 505 N.W.2d at 845.

While the facts shown by the Respondent at the preliminary hearing might support a determination that the Petitioner intended his conduct to have some detrimental effect within Michigan, those facts in no way show any actual detrimental effect in Michigan. It is undisputed that the package was sent into Michigan at the specific request of law enforcement agents and for the specific purpose of bringing criminal charges against the Petitioner. Thus, there was not even the potential for some adverse effects within Michigan in this case because law enforcement agents were at all times in

control of the transaction that was the basis for the criminal charges. This case is unlike one where police intervene to prevent a crime that is in progress. It also is uncontradicted that the package containing the cocaine was intercepted by Sergeant McLeod and so no cocaine actually threatened the public. This is plainly a case where there were no actual detrimental effects arising from the Petitioner's extraterritorial conduct.

In order to avoid dismissing the charge, the Circuit Court determined that this was a case where there were detrimental effects within Michigan "per se" (A-42). But the lower court cited no authority whatsoever to sustain this conclusion that detrimental effects arise solely because of the sending of contraband to the state. The decision below ignores the holding in *Blume*, 505 N.W.2d at 845, which is based upon this Court's decision in *Strassheim*, that the exception recognized in that case is limited and depends upon a showing that extraterritorial acts "actually do have" a detrimental effect within the state. The Michigan courts had no basis for concluding as a matter of law that the Petitioner's conduct made him subject to prosecution in Michigan.

Because there is no indication that any detrimental effects resulted in Michigan as a result of the Petitioner's conduct, Michigan does not have jurisdiction to prosecute the Petitioner for that conduct, which occurred wholly outside the borders of Michigan. The state courts erred in denying the Petitioner's motion to dismiss based upon lack of jurisdiction, and a writ of certiorari should issue to correct that error.

III. ANY BASIS FOR JURISDICTION IN MICHIGAN OVER THE PETITIONER WAS MANUFACTURED AND CREATED BY AGENTS OF THE STATE IN VIOLATION OF DUE PROCESS.

The facts of this case demonstrate that the idea to send cocaine into Michigan was solely attributable to state officials or persons who were acting as agents for the state. As recognized in the Court of Appeals, Hall had been recruited by FANG and was acting in cooperation with state law enforcement agents when he called the Petitioner in Florida (A-25). It was Hall's idea to seek out the Petitioner for a cocaine transaction and Hall who requested the Petitioner to send contraband into Michigan. Hall was clearly acting as an agent of the state in initiating contact with the Petitioner. *See United States v. Strickland*, 245 F.3d 368, 386 (4th Cir. 2001) (government agents participating in a sting operation cannot be considered conspirators); *People v. Smyers*, 398 Mich. 635, 248 N.W.2d 156, 157 (1976) (one who is a government informer cannot be a coconspirator). Absent the involvement and suggestions of state agents, there would have been no activity of any kind which could have supported jurisdiction in the Michigan courts.

Several federal cases have held that jurisdiction may not be based upon circumstances which are manufactured by law enforcement agents, and courts have dismissed prosecutions where manufactured jurisdiction was found to exist. In *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985), *cert. denied*, 479 U.S. 822 (1986), the court held that a

charge of extortion had to be dismissed where the basis for federal jurisdiction was the movement of gambling equipment from Virginia to South Carolina. The court wrote that "federal agents may not manufacture jurisdiction by contrived and pretensive means," and cited the holding in another case that "when the jurisdictional predicate is based upon acts of undercover agents, the matter should be examined with greater than ordinary care, and that contrived activity by such agents may not satisfy the requirement." *Id.* at 163 (citing *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973)). The court went on to hold as follows:

> We do not think the commercial predicate for federal jurisdiction can be found in such pretense on the part of federal agents. Nor do we think the conviction for the substantive offenses maybe sustained on any theory of the subjective intention of the defendants or the effect of their conduct on commerce if they themselves had not been victims of false representations and the club had been opened and operated as the undercover agent had represented.

Brantley, 777 F.2d at 163.

The court in *United States v. Coates*, 949 F.2d 104 (4th Cir. 1991), also reversed a conviction where the sole basis for federal jurisdiction was circumstances contrived by law enforcement agents. The defendant had been charged with using interstate telephone facilities in connection with a

murder-for-hire scheme, but the facts showed that federal agents intentionally crossed state lines, placed a telephone call to the defendant, and engaged him in conversation about the scheme in order to create the basis for federal jurisdiction. The court held that "jurisdiction so patently contrived by government action should not be recognized in criminal prosecutions." *Id.* at 106. Similarly, in *United States v. Garrett*, 716 F.2d 257, 267 (5th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the court warned that a government informer should not, at the behest of the government, be able to unilaterally supply a jurisdictional element for an unlawful scheme by calling defendants from other states. *Accord United States v. Perrin*, 580 F.2d 730, 733 (5th Cir. 1978), *aff'd*, 444 U.S. 37 (1979).

Jurisdiction should not be recognized in the instant case because it was contrived by Hall and other state agents. The idea that the Petitioner should send a package into Michigan was conceived by Hall and members of FANG, and the sending of the package is the only possible basis for Michigan exercising jurisdiction over the conduct of the Petitioner. Courts must not allow law enforcement agents to manufacture and contrive circumstances in order to create jurisdiction because it brings the judicial system into disrepute. *Archer*, 486 F.2d at 682. Manufactured jurisdiction "is even more offensive in criminal than in civil proceedings," *id.*, and should not be countenanced by the judiciary. Thus, the charge against the Petitioner in the instant case should have been dismissed.

CONCLUSION

For the reasons set forth above, the Petitioner requests that this Court issue a writ of certiorari to the Michigan Supreme Court to review the decisions of the Michigan courts in this case.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

SCOTT ZAHN,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition for a *Writ* of *Certiorari* to the Michigan Supreme Court

APPENDIX

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

CASE NO.: 97-1183-FH
JUDGE: Hon. Duncan M. Beagle

v.

SCOTT ZAHN,

Defendant.

ORDER/OPINION GRANTING DEFENDANT'S MOTION TO DISMISS AND SUPPRESS EVIDENCE

This case arises from a criminal charge for delivery of cocaine, less than 225 grams. Defendant now brings this Motion to Dismiss and/or Suppress Evidence.

ISSUES

1. Whether Defendant Zahn possesses a legitimate expectation of privacy in a contraband package which he put in transit from Florida to Michigan via Federal Express.

2. Whether Defendant's expectation of privacy in the contraband package is one that society is prepared to find as a "reasonable expectation."

3. Whether, assuming that Defendant has standing to object, there was an illegal search and seizure of the package which should result in suppression of that evidence at trial.

4. Whether delivery of the contraband was made in Genesee County for the purposes of determining whether Genesee County is the proper forum for the hearing of this matter.

5. Whether Defendant possesses standing to object to the warrantless seizure of a Federal Express packet of money from Carolyn Kelly.

6. Whether Defendant was effectively under arrest and in custody in Florida at the time that he was questioned by a Flint Police Officer and whether the lack of *Miranda* warnings violated Defendant's rights.

7. Whether actions of the law enforcement officials rose to the level of reprehensible conduct amounting to an entrapment of Defendant.

FACTS OF THE CASE

On February 18, 1997, at the instigation of Flint police, James Hall contacted by telephone his long-time friend, Defendant Zahn, in order to arrange for the purchase of a

quantity of cocaine. Mr. Hall lived in Flint and Defendant Zahn in Davie, Broward County, Florida. There had been previous drug transactions between the two individuals and Mr. Hall arranged for the delivery of the drugs pursuant to their prior methods. Mr. Hall was to make a partial pre-payment for the contraband, and then Defendant Zahn would forward the drugs. Upon satisfactory delivery, Mr. Hall would then pay the balance.

On February 25, 1997, Sgt. Alan McLeod of the Flint Police Department, based upon information he had obtained as a result of eavesdropping on the telephone conversations between Defendant Zahn and James Hall, participated in the surveillance of the address of 2220 E. Court Street, Flint, Michigan, the place that Defendant was to send to cocaine via Federal Express. Mr. Hall was to send the balance of the payment to Mr. Zahn in Florida, also through Federal Express. Sergeant McLeod intercepted the Federal Express package at the Court Street address and took possession of the package, all without the benefit of a warrant. This package was addressed to a "Mrs. Jane Hoelzer" with a return address in Florida of a "Mr. John Hoelzer." The package was never actually delivered to any one other than the officer. The contents were tested and found to be cocaine.

On February 27, 1997, Sgt. McLeod and Lieutenant Compeau traveled to Florida with an arrest warrant for Mr. Zahn. With the assistance of Florida police officers, they went to the address to which the payment was to be delivered, specifically, Summer Breeze Apartments, Apt. 1022. A Florida officer posed as a Federal Express driver and delivered the

Federal Express package addressed to Carolyn Kelley to the Summer Breeze address. This package contained the payment for the cocaine. Ms. Kelly accepted and signed for the package. The Flint officers then followed the Florida officers into the home and secured the identity of Barbara Zahn and Carolyn Kelly. Sgt. McLeod took possession of the Federal Express package containing $5,980.00.

Mr. Zahn arrived at the residence shortly thereafter. Sgt. McLeod advised Mr. Zahn that he was there with other officers to investigate the Federal Express delivery of money. Sgt. McLeod asked Mr. Zahn if there was a place where they could talk. Mr. Zahn offered the use of the bedroom and the officer advised Mr. Zahn that he was not under arrest or in custody. However, in deposition testimony, Sgt. McLeod testified that "[Mr. Zahn] would not have been able to walk out of there, but as far as the circumstances were . . . he was not in custody."

Sgt. McLeod asked several questions relating to the delivery of money and cocaine while in the bedroom without giving Mr. Zahn a *Miranda* warning. Mr. Zahn indicated that the money was re-payment for Mr. Hall's attorney fees in a criminal case and denied knowledge of the cocaine delivery. Officer McLeod then arrested Mr. Zahn, and was given permission by Mr. Zahn to search the truck and by Mrs. Zahn to search the apartment.

This search resulted in the officer discovering an appointment book in Defendant Zahn's truck. Within the book, the name "Hoelzer" was written on the date of February

18, which was the date of Mr. Hall's and Defendant Zahn's prior conversation and was the same name used on the contraband package.

As a result, Defendant Zahn has been charged with Delivery of Cocaine in the State of Michigan.

Mr. Zahn now raises several issues and asserts that certain evidence should be suppressed pursuant to the exclusionary rule. Further, Defendant states that he was entrapped by his childhood by law enforcement officials through his friend Mr. Hall.

DISCUSSION

ISSUE ONE

Defendant asserts standing to protest the allegedly illegal search and seizure of the contraband package.

The right of persons to be secure against unreasonable searches and seizures is guaranteed by the Fourth Amendment. U.S. Const., Am. IV; Const. 1963, Art. 1, § 11; *People v. Catanzarite*, 211 Mich. App. 573, 580, 536 N.W.2d 570 (1995).

"Only an individual who 'belongs to the class for whose sake the constitutional protection is given' can seek to invoke its protection." *Smith, supra,* at 17 (*citations omitted*). Although Defendant arguably had a possessory interest in the contraband package and has become subject to Michigan investigation and prosecution, there is no "automatic standing" conferred upon Defendant based on an alleged

possessory interest. *People v. Smith*, 420 Mich. 1, 6, 360 N.W.2d 841 (1984). Whether a defendant has standing is determined by the "reasonable expectation of privacy" test. *Id.* at 20. In *Smith*, the court stated that standing will be conferred when a defendant, under a totality of the circumstances, has a reasonable expectation of privacy in the object which has been subjected to a search or seizure. Further, that expectation must be one that society is prepared to recognize as reasonable. *Id.* This right is personal and defendant bears the burden of proving standing. *People v. Nash*, 418 Mich. 196, 204; 341 N.W.2d 439 (1983).

Defendant Zahn states that he possessed a reasonable expectation of privacy in the contraband package. According to Justice Powell in his concurring opinion in *Rakas v. Illinois*, 439 US 128, 152-55 (1978) (*parallel citations omitted*), the court must look to whether a person "invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy--that is, precautions customarily taken by those seeking privacy." *See, e.g., United States v. Chadwick*, 433 US 1, 11: (*parallel citations omitted*) (1977). ("By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination.) The courts have found it important to look to the "manner in which an individual has attempted to preserve the private nature of a particular fact." *U.S. v. Jacobsen, et al.*, 466 U.S. 109 (1984) (*parallel citations omitted*).

In the instant case, Defendant packaged the contraband in several layers and containers. He addressed the package to a "Mrs. Jane Hoelzer" and indicated a return address of "Mr. John Hoelzer." He then placed it into the

hands of Federal Express for the purposes of delivery to Flint. It is reasonable to assume that Defendant was attempting to maintain his privacy. However, an expectation of privacy must be legitimate.

In *People v. Lombardo*, 216 Mich. App. 500, 549 N.W.2d 596 (1996), a somewhat similar situation took place. A package containing cocaine was discovered by search dogs at a Federal Express office in Broward County, Florida. This package was addressed to a "Joe Panta" at an address in Lansing, Michigan. The police seized the package at a Federal Express office. Pursuant to instructions from Michigan police, prepared a "look-alike" package. A police offer posing as a Federal Express delivery person made a controlled delivery of the package to the Lansing address. At the time of delivery, Defendant Louise Lombardo accepted the package and signed the invoice as "Louise Panta." Subsequently, Defendant Lombardo was arrested for possession of cocaine. *Id.* at 597-98. Defendant then raised the issue of standing.

The court found that Defendant Lombardo's failure to establish that "Joe Panta" was her alias went to the issue of whether there was a legitimate expectation of privacy. *Id.* at 599. The court said that there was no evidence that Louise Lombardo possessed "fictitious identification" bearing the name "Joe Panta," and no witnesses were produced supporting her allegation that she was known as "Joe Panta." The evidence raised the inference that Joe Panta was a different individual, and possibly male." *Id.*

The court reviewed similar cases which addressed the expectation of privacy issue. In a Fifth Circuit case, *United States v. Richards*, 638 F.2d 765, (C.A. 5, 1981), the defendant was deemed to have standing where he opened a post office box with an alias and received contraband packages. *Id.* at 768. The court determined that there was standing because the defendant and the alias were the same entity. *Id.* at 770. Similarly, the court held defendants had standing where fifty gallon drums containing marijuana addressed to a "Roland Martin" were opened without a warrant. *U.S. v. Villarreal*, 963 F.2d 770 (C.A. 5, 1992). The court found that "Roland Martin" was defendants' alter ego because defendant Villarreal possessed an invoice bearing that name and defendant Gonzalez had been introduced to one defendant as "Roland Martin." *Id.* at 774.

In comparison, in *United States v. Daniel*, 982 F.2d 146 (C.A. 5, 1993), a controlled delivery of a contraband package addressed to a person other than defendant was delivered to defendant's home. Defendant was charged with possession and intent to deliver. The court held that there was no legitimate expectation of privacy in the package because the addressee and the defendant were two different people and the use of an alias was a part of the criminal scheme. *Id.* at 149, quoting *United States v. Lewis*, 738 F.2d 916, 919-20, n. 2 (C.A. 8, 1994).

In *Lewis*, defendant implemented a scheme to obtain merchandise that he had purchased with fraudulently obtained credit cards. Defendant had set up a mailbox with the name "David Woods." In a footnote in *Lewis*, the court

noted that "[w]e have no difficulty concluding that Lewis lacked a legitimate expectation of privacy in the mailbox and its contents and, accordingly, that he would have no standing to raise the issue concerning evidence flowing from the mailbox search . . . . A mailbox bearing a false name with a false address and used only to receive fraudulently received mailings does not merit an expectation of privacy that society is prepared to recognize as reasonable." *Id.* at 919-20, n. 2.

However, all these cases basically involve a defendant receiving items and being charged with possession. The instant case is distinguishable in that Defendant was not on the receiving end of the contraband and is being charged with delivery, not possession. Further, for purposes of establishing standing, Defendant has admitted that he sent the package.

It is clear from the record that Defendant Zahn took "normal precautions to maintain his privacy-that is, precautions customarily taken by those seeking privacy." *See, e.g., United States v. Chadwick,* 433 US 1, 11 (1977) (*parallel citations omitted*). He wrapped the package in several layers and containers to prevent others discovering their contents and placed it into the hands of Federal Express.

Although one may argue that society is not prepared to recognize this "expectation of privacy" in that the acts and alias were part of a criminal scheme, it is clear society recognizes that an individual expects objects placed in the mail or within the hands of private couriers to remain secure and private. To maintain that there is no expectation of privacy because of the contraband nature of the package is to

dilute the constitutional rights afforded our citizens. It is a fundamental principle that "[a] search prosecuted in violation of the Constitution is not made lawful by what it brings to light. *Byars v. U.S.*, 273 US 28, 29 (1927).

Further, the People must prove that Defendant Zahn "delivered" the package. It is inherently unfair for the State to hold the Defendant responsible for an act, claiming that he "delivered" the package, but on the other hand, for purposes of standing, deny that Defendant "delivered" the package simply because the of the addressees and names on the package.

Was a Warrant Necessary?

The public at large recognizes a legitimate expectation of privacy in letters and other sealed packages and such items are members of the general class of effects for Constitutional purposes. *Jacobsen, supra,* at 114. The Fourth Amendment requires that the government obtain a warrant before searching a package, even if the government has seized the package to prevent the loss or destruction of suspected contraband. *Id.* A warrantless search cannot be determined to be reasonable simply because contraband is revealed. *Id.*

In *Ex parte Jackson*, 96 U.S. 727 (1877) (*parallel citations omitted*), the Court established that sealed mailed packages cannot be opened without a warrant. The court stated:

> In [the] enforcement [of regulations as to what may be transported in the mails], a distinction is to be made between different kinds of mail

> matter, – between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage . . . Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened examined under like warrant . . . .

Thus, it appears that a warrant was necessary for the seizure of the contraband package, absent an exception to this Constitutional requirement.

Result of Search and Seizure of Package Without a Warrant

It is well-settled that a warrantless search and seizure is presumed unreasonable absent an exception to the constitutional requirement of a warrant. Those exceptions are: (1) the automobile exception; (2) the search incident to arrest doctrine; (3) consent; (4) plain view; (5) hot pursuit; (6) inventory searches; or (7) probable cause plus exigent circumstances. *People v. Marshall*, 69 Mich App 288, 293, n5 (1976). If no exception to this rule is demonstrated, the exclusionary rule operates to bar the physical, tangible

materials obtained either during or as a direct result of an unlawful invasion to be used against the defendant at trial. *Wong Sun v. United States*, 371 US 471, 485 (1963) (*parallel citations omitted*).

The People have presented no evidence that the warrantless search and seizure of the contraband package in Flint was made pursuant to an exception under the rule. The People rely upon the assertion that Defendant has no standing to object to the search and seizure. For the reasons stated above regarding standing, the court finds that Defendant does have standing to object to the search and seizure and that as such, the exclusionary rule should be applied to exclude evidence of the contraband at trial.

Should this case be reviewed by the Michigan Court of Appeals, this court has provided its opinion on the remaining issues.

ISSUE TWO

Defendant asserts that the delivery of cocaine in Florida, not Michigan and that venue is not properly laid in Michigan.

Defendant argues that venue in Michigan is improper on the basis that delivery of the package was made in Florida when Defendant placed the package into the hands of Federal Express. Defendant states that there was no delivery made in Michigan because the package of cocaine was intercepted by the police officers and Michigan does not recognize an attempted delivery offense.

As authority for its position, Defendant offers the case of *Wayne Prosecutor v. Recorder's Judge*, 177 Mich App 762 (1989), which in essence states that there is no offense as attempted delivery of cocaine under Section 7401 of the controlled substances act because the attempt is merged into the crime of delivery itself.

Therefore, Defendant concludes, that if no delivery occurred within Michigan, and there is no recognizable "attempted delivery" offense, that there is no basis upon which to hold Defendant responsible in Michigan for his acts or to require him to defend in Michigan.

Whether delivery occurred is one of the elements of the prosecution's case and the court finds that this ultimate issue is one that should be decided by the factfinder at trial. However, even assuming there is no "attempted delivery" offense whereby Defendant could be convicted, this is not dispositive of the venue issues.

MCL 333.7105, Sec. 7105 (1), provides a definition of the term "delivery" and states:

> "Deliver" or "Delivery" means the actual, constructive, or attempt to transfer from one person to another of a controlled substance, whether or not there is an agency relationship.
>
> Therefore, the term "delivery" is an "attempt to transfer . . . a controlled substance."

Although Defendant was present in the state of Florida at the time he performed his physical acts, this does not protect him for liability for those acts in Michigan. Generally, a court may assert jurisdiction over those "offenses as may be committed within its jurisdiction." *People v. Devine*, 185 Mich 50, 52-53; 15 NW 646 (1915). An exception to this rule is for acts which occur outside the state's borders but are intended to have a detrimental effect upon the state. *Strassheim v. Daily*, 221 US 280, 285 (1911); *People v. Blume*, 443 Mich 476, 480; 505 N.W.2d 843 (1994).

In *People v. Blume*, Defendant, a Florida resident sold cocaine to a Michigan resident while both were in Florida. *Id.* Defendant was charged with intent to deliver. The court stated that the facts failed to show that Defendant did intend a detrimental effect because it was unclear that Defended intended the cocaine for distribution in the state of Michigan.

However, the facts in the instant case demonstrate that Defendant Zahn at least attempted to transfer the contraband package to Genesee County and intended detrimental effects within the State of Michigan by putting the package into transit through the agency of Federal Express. It is reasonable to hold him responsible for those acts in the State of Michigan. When "it is clear that the intended distribution would occur within the jurisdiction attempting to punish the defendant, then 'jurisdiction may be maintained . . . .'" *Blume* at 488, quoting *United States v. Baker*, 609 F.2d 134 (C.A. 5, 1980).

The prosecution must still prove all the elements of delivery. For the purposes of jurisdiction, however, pursuant

to the statutory definition of "delivery" and for the foregoing reasons, the court finds that there is a satisfactory basis upon which to hold Defendant Zahn subject to the court's jurisdiction.

ISSUE THREE

Defendant claims the Flint Officer lacked authority to request Carolyn Kelly to give him the Federal Express package of money.

Defendant claims that the Flint police lacked authority in Florida to request Carolyn Kelly to release the Federal Express package of money to their custody. Defendant points to MCL 764.2(a); MSA 28.861(1) for the limits imposed upon an officer's authority or powers.

That statute states:

> MCL 764.2a Authority of peace officer outside his own bailiwick.
>
> A peace officer . . . may exercise authority and powers outside his own county, city, village, or township, when he is enforcing the laws of this state in conjunction with the Michigan state police, or in conjunction with a peace officer of the county, city, village, or township in which he may be, the same as if he were in his own county, city village, or township.

This statute refers to the ability of a peace officer to fulfill his duty outside of his bailiwick as long as he does so in conjunction with officers of the bailiwick in which he attempts to exercise that authority. This statute does not specifically allow an officer to exercise his authority beyond state lines.

However, the court need not go that far in deciding this issue. The facts are clear that the Federal Express package was addressed to Carolyn Kelly, received by her, and signed for by her. The issue once again turns upon Defendant's ability to assert standing to object to an allegedly invalid search and seizure. Defendant must show that he possessed a legitimate expectation of privacy, under the totality of the circumstances, which society is prepared to deem reasonable. *Smith, supra.* An alleged possessory interest is insufficient. Turning to those "circumstances," the court finds upon a review of the facts that the package was neither addressed to Defendant Zahn nor directly received by him. Further, upon the rational elucidated in *Smith* and the cases cited therein, it is not reasonable for Defendant to have an expectation of privacy in a package which was sent by someone other than Defendant and intended for receipt by someone else.

Therefore, the first prong of the "reasonable expectation of privacy" test is not met and Defendant has no standing to object to an alleged illegal search and seizure of the package of money.

ISSUE FOUR

Defendant claims the lack of Miranda warnings at the time he was questioned raises suppression of issues.

Defendant argues that he was effectively under arrest and in custody in Florida at the time Officer McLeod questioned Defendant in Defendant's bedroom.

In *People v. Hill*, 429 Mich 382 (1987), the court stated that the *Miranda* warning requirements are triggered when the suspect is in custody as distinguished from when he is the focus of the investigation. A custodial interrogation occurs when law enforcement officers initiate questioning and the defendant has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.*

The facts indicate that when Officer McLeod questioned Defendant that several officers were present in the apartment and the surrounding area. Officer McLeod admits that he did not issue a *Miranda* warning, and that he told Defendant he was not in custody. However, Officer McLeod testified that Defendant Zahn would not have been able to "walk out of there."

As a result of McLeod's questioning, the police discovered a day planner in Defendant's truck containing the name "Hoelzer" written upon the date of February 18, 1997, the day Defendant made contact with Mr. Hill regarding the proposed drug transaction.

A police officer's subjective opinion whether the person being interrogated is in the custody for purposes of *Miranda* warnings is not dispositive of the issue of whether the defendant was in custody. *Stansbury*, 511 U.S. 318 (1994). The failure to give these warnings to an individual in custody works to effect suppression of the directly resulting statements. *Harris v. New York*, 401 US 222 (1971). Further, where evidence is discovered as a result of such statements, the police misconduct may result in the exclusion of that

evidence at trial. In *Silverthorne Lumber v. United States*, 251 US 385, 392 (1920) (*parallel citations omitted*), the Court held that the exclusionary rule applies not only to the illegal obtained evidence itself, but also to other incriminating evidence derived from the primary evidence. However, where the knowledge of a fact is gained from an independent source, it may be proved through that independent source. *Id.*

The court finds that the circumstances surrounding the questioning of Defendant in his apartment rise to the level of custodial interrogation and that Defendant was entitled to *Miranda* warnings. Any statements the police derived from that interrogation is entitled to suppression at trial. The facts also show that the notebook seized pursuant to this interrogation is incriminating evidence which was derived from the tainted primary evidence.

The prosecution has not proven that the connection between the lawless conduct and the discovery of the challenged evidence has become so attenuated as to dissipate the taint. *Smith, supra*, at 193. The exclusionary rule has been extended to apply to evidence that is the fruit of unlawful police conduct as measure to deter police from violations of constitutional and statutory protections. Although the result is an "admittedly drastic and socially costly course" to effect such deterrence, the "prosecution is not to be put in a better position than it would have been if no illegality had transpired." *People v. Harajli*, 148 Mich. App. 189, 384 N.W.2d 126 (1985) quoting *Nix v. Williams*, 467 US 431, 442-44 (1984) (*parallel citations omitted*).

Therefore, any evidence obtained directly as a result of this interrogation which cannot be proved through an independent source must be suppressed.

ISSUE FIVE

Defendant argues that the law enforcement official's pre-arrest conduct constitutes entrapment as a matter of law.

Defendant Zahn [sic] that the police conduct in the use of Mr. Hall in procuring the cocaine from Defendant was impermissible and constituted entrapment.

Entrapment is analyzed under the "objective test" in Michigan. *People v Jamieson,* 436 Mich 61; 461 N.W.2d 884 (1990). The Michigan Supreme Court stated that entrapment may be found where either the alleged police conduct is so reprehensible as to induce a law-abiding citizen situated similarly to the defendant to commit the crime or that the police conduct is so reprehensible that a civilized society could not tolerate it. *People v. Juillet,* 439 Mich 34, 53; 479 N.W.2d 786 (1991). "[C]onsideration must be given to the willingness of the accused to commit the act weighed against how a normally law-abiding person would react in similar circumstances. *Jamieson, supra,* at 74. The purpose of the objective entrapment test is to "discourage police conduct that manufactures, induces or instigates the commission of a crime . . ." through the invalidation of convictions that result from such conduct, *People v. Turner,* 390 Mich 7, 20; 210 N.W.2d 336 (1973).

In *People v. James Williams*, 196 Mich. App. 656, 661-62; 498 N.W.2d 407 (1992), the court listed several factors to assist the court in determining if the government activity would induce criminal conduct. They court finds the following factors helpful:

(1) Whether there existed any appeals to the defendant's sympathy as a friend;

(2) Whether the defendant had been known to commit the crime with which he was charged;

(3) Whether there existed any inducements that would make commission of a crime unusually attractive to a hypothetical law-abiding citizen;

(4) Whether and to what extend any governmental pressure existed;

(5) Whether there existed any governmental procedures that tended to escalate the criminal culpability of the defendant;

(6) Whether there was police control over any informant;

(7) Whether the investigation is targeted.

Defendant argues that he was entrapped because the police caused Mr. Hall to call Defendant and ask for cocaine. There were prior drug transactions between Mr. Hall and

Defendant. There is no evidence that the police made possible any inducements that would make commission of a crime unusually attractive to a hypothetical law-abiding citizen.

In *People v. Potra*, 191 Mich. App. 503; 479 N.W.2d 707 (1991) the court found there was no entrapment where there had been prior drug dealings between a friend and the Defendant before the police asked the friend to again request drugs from the Defendant. The court found that the friend may have originally "induced the defendant into becoming involved in drug dealing on the basis of their past friendship, but he was not acting as an agent for the government when he did so." *Id.* at 509. The court stated that the police conduct was not reprehensible nor rose to the level that would induce a normally law abiding citizen to commit the crime in question. *Id.* Simply providing a defendant with the opportunity to commit the crime of delivery is not entrapment. *See e.g., People v. Wilson*, 166 Mich. App. 143; 419 N.W.2d 750 (1988); *People v. Steele*, 150 Mich. App. 728; 389 N.W.2d 164 (1986); *People v. Hentowski*, 154 Mich. App. 171; 397 N.W.2d 255 (1986).

There is nothing upon the record to indicate that the type of conduct in which the police engaged rose to the level of reprehensible conduct that society is not either prepared to tolerate or that would induce a normally law-abiding citizen to commit a crime.

Therefore, for the foregoing reasons, the court find that Defendant is not entitled to a defense of entrapment.

CONCLUSION

Therefore, the court is satisfied through a review of the parties' pleadings, briefs, affidavits, relevant case law, statutes and oral arguments, that the following findings are warranted.

1. Defendant possessed a reasonable expectation of privacy in the contraband package and has standing to object to the package's warrantless search and seizure.

2. That there existed no exception to the warrantless search and seizure of the contraband package and this evidence should be suppressed at trial.

3. Jurisdiction is properly laid within Michigan.

4. Defendant does not have standing to object to the seizure of the Federal Express package of money from Carolyn Kelly.

5. Defendant was effectively in custody and interrogated at his home without benefit of *Miranda* warnings.

6. The result of the failure to issue warnings is that the statements which are not independently derived should be suppressed.

7. Defendant was not entrapped.

THEREFORE, it is hereby ORDERED that the contraband evidence is to be suppressed and that this case is hereby DISMISSED.

1 - 9 - 98
DATE

Duncan M. Beagle
DUNCAN M. BEAGLE
Circuit Court Judge

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SCOTT LOUIS ZAHN,

Defendant-Appellee.

FOR PUBLICATION
March 12, 1999
9:05 a.m.

No. 209176
Genesee Circuit Court
LC No. 97-001183 FH

Before: Talbot, P.J., and McDonald and Neff, JJ.

TALBOT, P.J.

The prosecution appeals as of right from a circuit court order granting defendant's motion to suppress certain evidence and to dismiss the charge of delivery of 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). We reverse.

At the hearing regarding defendant's motion to suppress, the parties stipulated to allow the circuit court to decide the motion solely on the basis of the testimony taken at

the preliminary examination.[1] At the preliminary examination, James Hall testified that he had been a friend of defendant's for about thirty years. Acting in cooperation with the police, Hall telephoned defendant in Florida and arranged to buy some cocaine. Hall and defendant agreed that Hall would send a partial payment of $3,000 to Carolyn Kelly, in Florida. Upon receipt of the money, defendant would send the cocaine to Tim Reiter's residence at 2220 East Court Street, Apartment 2, in the city of Flint. The cocaine was to be addressed to a "Mrs. Hoelzer or Hoelzen." Upon satisfactory delivery, Hall was to send the $6,000 balance to the Florida address. Hall obtained $3,000 from the police and sent it to Kelly in Florida. A few days later, defendant telephoned Hall and informed him that the cocaine had been sent.

Flint Police Sergeant Alan McLeod testified that he intercepted and took into his possession a Federal Express package delivered to the residence at 2220 East Court Street in the city of Flint. The package was addressed to "Jane Hoelzer." The sender was listed as "John Hoelzer" of 400 Park Street, Hollywood, Florida. McLeod opened the package to discover a bubble cushion envelope containing a brown paper bag wrapped tightly around a Tupperware container that was taped shut. Inside the Tupperware container was a Ziplock bag containing a crystalline material that was later revealed to be 275 grams of a substance containing cocaine.

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[1]Under MCR 6.110(D), parties may stipulate to the use of a preliminary examination transcript to resolve a motion to suppress. See *People v Kaufman*, 457 Mich 266, 275-276; 577 NW2d 466 (1998).

Working in conjunction with police in Florida, police from the city of Flint staged a delivery of the remaining balance of money "owed" to defendant for the cocaine. A Florida police officer, posing as a Federal Express delivery person, delivered $6,000 in a Federal Express envelope to a woman at Kelly's Florida apartment. Shortly thereafter, McLeod went to the apartment and spoke to the woman. She identified herself as Kelly and authorized the officers to enter and search the apartment. Four or five police officers entered the apartment while six more officers waited outside. It was apparent that the officers were armed. In the course of their search, the police recovered the Federal Express envelope containing the cash. Shortly thereafter, defendant arrived at the apartment.

McLeod introduced himself and told defendant that he was involved in an investigation regarding some money that had been sent from Michigan to the Florida apartment. When he asked defendant if there was some place they could talk, defendant suggested the bedroom. Three police officers went into the bedroom with defendant. McLeod advised defendant that he was not under arrest and that he was not in custody. Defendant indicated to McLeod that he understood that he was not under arrest. When asked about the $6,000, defendant explained that Hall sent it as repayment of a loan. Defendant denied knowing anyone whose last name was "Hoelzer," and explained that he did not know who would be mailing cocaine to Hall. Defendant then consented to the search of his vehicle. Police recovered a date book with defendant's name and address written on the front page. The word "Hoelzer" was

written on the page for the day on which Hall had placed his order.

Before leaving Michigan, McLeod obtained a warrant for defendant's arrest. During the interview in Florida, McLeod had the warrant in his possession. At the preliminary examination, McLeod testified that defendant would not have been allowed to "walk out of" the Florida apartment. This information was not conveyed to defendant. Sometime after defendant was questioned in the bedroom, he was arrested and moved to Michigan. The actual circumstances and timing of defendant's arrest are not discernible from the lower court record.

After the preliminary examination, defendant moved to suppress (1) evidence of the Federal Express package mailed to the Flint apartment, (2) evidence of his exculpatory statements made to McLeod in Florida, and (3) all of the evidence seized in Florida. Defendant argued that the search and seizure of the Federal Express package was unconstitutional because the police did not have a warrant. The prosecution countered that defendant lacked standing. Defendant argued that his statements to the police in Florida were inadmissible because they were obtained without the benefit of *Miranda*[2] warnings. The prosecution countered that *Miranda* warnings were not required because the statements were not made during a custodial interrogation. In a written opinion and order, the trial court suppressed evidence of the

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[2]See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

cocaine recovered from the Federal Express package on the ground that a warrant was necessary. The trial court also suppressed evidence of defendant's exculpatory statements and the date book removed from his vehicle on the ground that they were both the product of an unlawful interrogation. On the basis of these rulings, the trial court dismissed the delivery charge.

On appeal, the prosecution again argues that defendant lacked standing to challenge the search and seizure of the Federal Express package containing the cocaine. We agree. To the extent a trial court's decision regarding a motion to suppress is based on an interpretation of the law, appellate review is de novo. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). Factual findings made in conjunction with a motion to suppress are reviewed for clear error. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). The deferential "clear error" standard is the appropriate standard of review for findings of fact because the trial court is usually in a superior position to assess the evidence. See *People v Mack*, 190 Mich App 7, 17; 475 NW2d 830 (1991). In this case, however, the trial court made its decision solely on the basis of the preliminary examination transcript. Therefore, the trial court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's "findings."

In Michigan, a person's right to be secure from unreasonable searches and seizures is guaranteed by both the state and federal constitutions. See *People v Smith*, 420 Mich 1, 18-19; 360 NW2d 841 (1984), quoting Const 1963, art 1, § 11

and US Const, Am IV. The right is personal and may only be invoked "'at the instance of one whose own protection was infringed by the search or seizure.'" *Smith, supra* at 17 and 24, quoting *Simmons v United States*, 390 US 377, 389; 88 S Ct 967; 19 L Ed 2d 1247 (1968). Thus, a defendant is said to have "standing" to challenge a search or seizure if, under the totality of the circumstances, he has a subjective expectation of privacy in the object of the search or seizure and the expectation of privacy is one that society is prepared to recognize as reasonable. *Smith, supra* at 28; see also *Rakas v Illinois*, 439 US 128, 143, n 12; 99 S Ct 421; 58 L Ed 2d 387 (1978). The defendant bears the burden of establishing standing. *People v Lombardo*, 216 Mich App 500, 505; 549 NW2d 596 (1996).

A wrapped package delivered by a private freight carrier, like a letter sent through the United States mail, is among the class of effects in which a member of the public may have a legitimate expectation of privacy. *United States v Jacobsen*, 466 US 109, 114; 104 S Ct 1652; 80 L Ed 2d 85 (1984); see also *Lombardo, supra* at 505. As a general rule, both the sender and the addressee have a legitimate expectation of privacy with regard to a mailed item while the item is en route. Upon delivery, the sender's legitimate expectation of privacy terminates. See 4 LaFave, Search and Seizure (2d ed), § 11.3(f), pp 341-346; see also *United States v King*, 55 F3d 1193, 1195-1196 (CA 6, 1995); *United States v DiMaggio*, 744 F Supp 43, 46 (ND NY, 1990). In this case, defendant has admitted

that he sent the Federal Express package in question.[3] On the bases of defendant's admission and the fact that the package was carefully wrapped, the trial court concluded that defendant had standing to contest the search and seizure of the package. While it is undisputed that defendant would not have a privacy interest worthy of constitutional protection if he did not send the package, see, e.g., *United States v Koenig*, 856 F2d 843, 846 (CA 7, 1988), we are not persuaded that his role in instigating the delivery of the package was, in itself, sufficient to establish standing to challenge its eventual search and seizure.

Defendant has failed to establish any connection between himself and the package beyond the fact that he was the person who caused its delivery by Federal Express. Nothing in the record suggests that defendant was known as "John Hoelzer," the name listed on the package as being the sender, and there is no apparent connection between defendant and the return address listed on the package. In *DiMaggio, supra*, a federal district court held that the true sender's legitimate expectation of privacy "vanishes" when his identity is not indicated on the surface of the package. In such a case, "it is as if the package had been abandoned since by withholding from society that he is the source, [the true sender] has effectively repudiated any connection or interest in the item vis-a-vis society, and no longer has the means to

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[3]The trial court stated in its opinion and order that, "for purposes of establishing standing," defendant "has admitted that he sent the package." Although the admission itself is not readily apparent in the lower court record, we will defer to the trial court's understanding of defendant's position below.

exclude others from intruding upon the contents of the package." *Id.* at 46 (citation omitted); see also *United States v Wood*, 6 F Supp 2d 1213, 1224 (D Kan, 1998). A person can deprive himself of standing by abandoning the object of the search or seizure. See *People v Jordan*, 187 Mich App 582, 589; 468 NW2d 294 (1991), citing *People v Mamon*, 435 Mich 1, 4; 457 NW2d 623 (1990) (Riley, C.J.). We are persuaded by, and adopt, the reasoning employed by the federal district court in *DiMaggio, supra.* Accordingly, we hold that by effectively abandoning the package and its contents in the manner described, defendant has abandoned his right to challenge the search and seizure of the package.[4]

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[4]Our resolution in this case is consistent with the rule established in *Lombardo, supra.* There, the issue was whether a woman had standing to challenge the search and seizure of a package intended for delivery to her address but not to her name. The police seized the package en route and delivered a "look-alike" package to the defendant's apartment. The defendant, who was the sole tenant of her apartment, signed for the "look-alike" package under a fictitious name different than her own name and the name on the package. Despite the fact that defendant expected to receive the package, and possessed the look-alike package when it was delivered, this Court held that she did not have standing to object to its search and seizure because she could not establish any connection between herself and the name listed on the package as the intended recipient. *Id.* at 505-509. The *Lombardo* Court further indicated that, even if the defendant had been able to establish a connection between herself and the apparently fictitious name on the package, it "would still be inclined to find a lack of Fourth Amendment standing because the use of the alias was part of a criminal scheme." *Id.* at 509, citing *United States v Daniel*, 982 F2d 146, 149 (CA 5,

Next, the prosecution argues that the trial court erred in concluding that McLeod's questioning of defendant in the Florida apartment ran afoul of *Miranda*. In particular, the prosecution contends that *Miranda* warnings were not required because defendant was not in custody during the interview. We agree. On appeal, the issue whether a person is in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after review de novo of the record. *Mendez, supra* at 382; see also *Marsack, supra* at 372 (explaining that mixed questions of law and fact are reviewed de novo).

It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The term "custodial interrogation" means "'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda, supra* at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by

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1993) (surmising that a defendant would not have standing based on an alias where use of the alias was part of a criminal scheme).

either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

In this case, the trial court's conclusion that defendant was in custody when he was questioned by the police was based in large part on McLeod's testimony that defendant would not have been allowed to "walk out of" the Florida apartment if he had attempted to do so.[5] This consideration was improper. Because McLeod's intention to prevent defendant from leaving the apartment was not conveyed to defendant, it could not have had any bearing on a defendant's understanding of the situation. *Stansbury, supra* at 323-324.

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[5]In its opinion and order, the trial court reasoned as follows:

> The facts indicate that when Officer McLeod questioned Defendant that several officers were present in the apartment and the surrounding area. Officer McLeod admits that he did not issue a *Miranda* warning, and that he told Defendant he was not in custody. However, Officer McLeod testified that Defendant Zahn would not have been able to "walk out of there."

Contrary to the implication of the concurring/dissenting opinion, the trial court made no finding of historical fact that "defendant could reasonably have believed he was not free to leave, even though the officer told him otherwise." Further, as noted in our discussion of defendant's first issue, there is no reason to give special deference to the trial court's factual findings in this case because the trial court made its ruling on the basis of the preliminary examination transcript.

That aside, the limited record does not support a conclusion that defendant was in custody when questioned. The trial court found that the interrogation occurred in a room selected by defendant and that defendant was assured he was not in custody or under arrest; moreover, McLeod's testimony indicates that the duration of the interrogation was brief.[6] Cf. *People v McElhaney*, 215 Mich App 269, 278-279; 545 NW2d 18 (1996). Therefore, *Miranda* warnings were not required, and evidence of the few exculpatory statements made by defendant in the Florida apartment should not have been suppressed.

Finally, the prosecution argues that the trial court erred in suppressing evidence of the date book recovered during the search of defendant's vehicle. We agree. As noted, the trial court suppressed evidence of the date book seized from defendant's vehicle on the ground that it was "derived from" an improper interrogation. Because we now hold that the interrogation was proper, there remains no basis for the suppression of evidence of the date book. In any event, even if the interrogation had been improper, it would not have provided a basis for suppressing the evidence seized from the vehicle. The record is clear that defendant consented to the search, and, aside from the fact that the search was later in time, nothing suggests that it was related to the interrogation in any way.

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[6]The trial court made no specific finding with respect to the duration of the interrogation.

Because we hold that the trial court erred in suppressing evidence of (1) the cocaine recovered from the Federal Express package, (2) defendant's exculpatory statements made to McLeod in the Florida apartment, and (3) the date book recovered from defendant's vehicle, we reverse the trial court's order dismissing the case.

Reversed.

/s/ Michael J. Talbot
/s/ Gary R. McDonald

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SCOTT LOUIS ZAHN,

Defendant-Appellee.

FOR PUBLICATION
March 12, 1999

No. 209176
Genesee Circuit Court
LC No. 97-0011830 FH

Before: Talbot, P.J., and McDonald and Neff, JJ.

NEFF, J., concurring in part and dissenting in part.

I agree with the reasoning and result reached by the majority opinion with regard to the search and seizure issues involving the Federal Express package. I also agree with the result reached by the majority regarding the search of defendant's van. However, I do not agree with the analysis or result reached with regard to whether defendant was in custody when questioned in the Florida apartment for purposes of *Miranda*[1] protections. The totality of the

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[1]See *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

circumstances which resulted in the questioning in the apartment as revealed by the preliminary examination transcript leads me to conclude that defendant reasonably could have and probably did believe that he was in custody and that therefore he was entitled to an advice of rights pursuant to *Miranda*.

When defendant arrived at the apartment the police were already there in force, both inside and outside. They had obtained identification from the two women present and secured possession of the Federal Express package containing six thousand dollars, less twenty dollars. There were as many as six officers outside and three or four inside. None of the officers was in uniform, but some wore police jackets. The officers were armed and their weapons were visible. There were three officers present with defendant in the bedroom where the questioning took place. Even though the officers had a warrant for defendant's arrest and he was not free to leave the apartment, defendant was told that he was not in custody or under arrest. On questioning from the trial judge at the preliminary examination, the officer acknowledged that defendant "was the target of our investigation." The question is whether, under the circumstances, the trial judge clearly erred in finding the defendant could reasonably have believed he was not free to leave, even though the officer told him otherwise. In my view, clear error has not been shown.

Whether a person was in custody when interrogated by the police and therefore entitled to *Miranda* warnings, is a mixed question of law and fact, which is determined independently by this Court following a de novo review of the

record. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). This Court defers to the trial court's findings of historical fact unless those findings are clearly erroneous. *Id.* A finding of historical fact is clearly erroneous when this Court is left with the definite and firm conviction that a mistake has been made. *Id.*

I cannot conclude that clear error has been shown or reach the firm conviction that a mistake has been made. The presence of three armed police officers in a bedroom with defendant after defendant had already been confronted with the information that they were from a narcotics investigation unit which was investigating money which had been sent via Federal Express was more than enough to communicate to defendant that he was the target of their investigatory efforts and that he was not free to leave. I would affirm the ruling suppressing defendant's statements to the police in the apartment interrogation.

/s/ Janet T. Huff

Order

Michigan Supreme Court

Entered: September 28, 1999

Lansing, Michigan

Elizabeth A. Weaver,
Chief Justice

114352

James H. Brickley
Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 114352
COA: 209176

SCOTT LOUIS ZAHN,

Genesee CC: 97-001183-FH

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the March 12, 1999 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals.

Cavanah and Kelly, JJ., would grant leave to appeal.

[Seal]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 28, 1999 — Corbin R Davis

Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

7TH JUDICIAL CIRCUIT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

v. 97-1183-FH

SCOTT ZAHN,

Hon. Geoffrey L. Neithercut

Defendant.

At a session of said Court held at
the Court House in the City of Flint,
County of Genesee, State of Michigan,
on the 20th Day of December, 1999.

PRESENT: THE HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

The Court having considered Defendant's Motion for Reconsideration brought pursuant to MCR 2.119(F), the Court originally having heard oral argument in this matter on November 15, 199. At that time, this Court decided that cocaine in Michigan has a per se detrimental effect in

Michigan, with the full understanding that Defendant would bring an appeal of this matter. Defendant's supplemental response having not further persuaded this Court, the Defendant is not entitled to relief under MCR 2.119(F), as no palpable error has been demonstrated.

IT IS FURTHER ORDERED that Defendant's Motion for Reconsideration is DENIED and further proceedings are not directed.

Dated: 12-21-99 Geoffrey L Neithercut

Hon. Geoffrey L. Neithercut

Court of Appeals, State of Michigan

ORDER

	Richard Allen Griffin
People of MI v. Scott Louis Zahn	Presiding Judge
Docket No. 224466	Peter D. O'Connell
LC No. 97-001183-FH	Donald S. Owens
	Judges

The Court orders that the application for leave to appeal is DENIED for failure to persuade the Court of the need for immediate appellate review.

Richard Allen Griffin

Richard Allen Griffin
Presiding Judge

[Seal] A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

MAR 02 2000
Date

Carl L. Gromek
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order

Entered: July 18, 2000

Elizabeth A. Weaver,
Chief Justice

116514

Michael F. Cavanagh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 116514
COA: 224466
Genesee CC: 97-01183-FH

SCOTT LOUIS ZAHN,

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the March 2, 2000 decision of the Court of Appeals is considered, and it is DENIED because we are not

persuaded that the questions presented should now be reviewed by this Court.

Cavanagh, J., would grant leave to appeal.

[Seal]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 18, 2000

Corbin R Davis

Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff,

vs.

SCOTT ZAHN,

Defendant.

CASE NO. 97-1183-FH

JUDGE GEOFFREY L.
NEITHERCUT

P-25466

PLEA AGREEMENT

ARTHUR A. BUSCH
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NOW COMES the defendant herein by and through his attorney, Jerome F. O'Rourke, and the People of the State of Michigan, by and through a representative of the Prosecuting Attorney's office for Genesee County, Michigan,

and show unto the Court the following as a Plea Agreement that has been entered into between the parties.

IT IS STIPULATED AND AGREED that the defendant, pursuant to the Rules of Criminal Procedure, Rule 6.301(C)(2), will be permitted to enter a conditional plea of *nolo contendre* to violation of MCL 333.7401(2)(a)(iii); MSA 14.15(7401), *et seq.*

IT IS AGREED AND UNDERSTOOD that the conditional plea agreement preserves for appeal the following specified pretrial rulings, to-wit:

(a) Denial of suppression of evidence sought because of illegality of search and seizure.

(b) Denial of motion to dismiss for lack of jurisdiction over the offense.

(c) Denial of a motion to dismiss because any basis of jurisdiction over defendant's conduct was manufactured and created by agents of the state.

IT IS FURTHER STIPULATED AND AGREED that the defendant will expeditiously pursue his appellate rights, including application to the Michigan Court of Appeals and if necessary to the Supreme Court of the State of Michigan in accordance with the time provisions set forth in the court rules having to do with appeals or applications for leave to appeal, and/or any applications for *certiori* to the federal courts.

IT IS FURTHER UNDERSTOOD AND AGREED that the Court may enter an order staying the execution of any sentence it imposes and set bail pending the disposition of the appellate procedures described hereinabove. *See below for additional considerations*

ARTHUR A. BUSCH (P-33872)
Genesee County Prosecuting Attorney

By Timothy J. Cassady
Timothy J. Cassady
(P-43217)
Assistant Prosecuting Attorney

Dated 11/3/00

Jerome F. O'Rourke
Jerome F. O'Rourke
(P-18527)
Attorney for Defendant

Dated 11/8/2000

*It is further understood and agreed that the Defendant shall comply with MCR 7.209(7)(2)(a-f)

Scott Zahn
Scott Zahn
11-8-00

Original-Court
1st copy-Corrections
2nd copy – Corrections (for return)
Approved, SCAO

3rd copy-State Police
4th copy-Defendant
5th copy-Prosecutor

STATE OF MICHIGAN
7TH CIRCUIT COURT

JUDGMENT OF SENTENCE
COMMITMENT TO
CORRECTIONS DEPARTMENT

CASE NO.
97-001183-FR-N

ORI 250015J
COURT ADDRESS

PAGE 1
COURT TELEPHONE NO.
(810)257-3220

COUNTY CLERK-900 S. SAGINAW FLINT MI 48502

Police Report No.

THE PEOPLE OF
STATE OF MICHIGAN V

Defendant
ZAHN, SCOTT, LOUIS
4001 SW 56TH TERRACE
DAVIE FL 33314
CTN:259700063201 SID:
DOB: 4/11/61

Prosecuting attorney name	Bar no.	Defendant attorney name
BUSCH,ARTHUR A.,	33872	O'ROURKE, JEROME F., Bar no. 18527

THE COURT FINDS:

1. The defendant, represented by counsel, was found guilty on 11/08/00 of the crime(s) as stated below:

Plea: insert G for guilty plea; NC for nolo contendere; MI for mentally ill. Court: use X if sentence is to be enhanced because of Habitual Offender Act.

CT	CONVICTED BY PLEA	COURT	JURY	CRIME	CHARGE CODE (S) MCL CITATION/PACC CODE	
1	NC	_	_	CNTR SUB DEL 50-224 GR	333.740	12A3

2. The conviction is reportable to Secretary of State under MCL 257.732 or MCL 281.1040. The defendant's driver license number is: _____

3. HIV testing was ordered on _____. Confidential test results are on file.

IT IS ORDERED:

4. Defendant is sentenced to custody of Michigan Department of Corrections. This sentence shall be *delayed pending appeal. GEV*

CT	SENTENCE DATE	MINIMUM YR-MO-DY	MAXIMUM YR-MO	DATE SENTENCE
1	12/05/00	010-000-000	020-000	BEGINS 12/05/00

JAIL
CREDIT
MO-DY
000-001

OTHER
INFORMATION
_____

Defendant shall pay restitution of _____. If a cash bond/bail was personally posted by the defendant, payment toward restitution is to first be collected out of that bond/bail and allocated as specified under MCL775 .22.

5. Sentence(s) to be served consecutively to:
__ each other. __ case numbers
_____

x 6. Defendant shall pay a $60.00 assessment for the Crime Victim Rights Fund

7. Court recommendation:
JACKSON PRISON. COURT RECOMMENDS SAI PROGRAM. SENTENCE DELAYED PENDING APPEAL.

8. Defendant shall pay a ____ assessment for forensic lab test.

Date: December 5, 2000 Judge: Geoffrey L Neithercut

HON GEOFFREY L. NEITHERCUT

Bar No: 25466

Under MCL 769.16a the clerk of the court shall send a copy of this order to the Michigan State Police Central Records Division to create a criminal history record.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL) Kimberly Austin

Deputy court clerk

MCL765.15(2); M5A28.902(2), MCL769.16a; M5A28.1086(1), MCL775.22; M5A28.1259, MCL78O.766; M5A28.1287(766), MCR6.427(A)

CC 219b (6/98) JUDGMENT OF SENTENCE, COMMITMENT TO CORRECTIONS DEPARTMENT

CERTIFICATE COPY OF RECORD 97-1183-FH Neithercut

STATE OF MICHIGAN

SS.

County of Genesee

I, MICHAEL J. CARR, Clerk of said County of Genesee and Clerk of the Circuit Court for said County, do hereby certify that I have compared the foregoing copy of Judgment of Sentence with the original record thereof now remaining in my office, and that is a true and correct copy therefrom, and of the whole of such original record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court and County, this 5th day of December A.D. 2000.

MICHAEL J. CARR, Clerk

By Sabrina L Jones

Deputy County Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

SCOTT ZAHN,

Defendant.

CASE NO. 97-1183-FH

JUDGE GEOFFREY L. NEITHERCUT

P-25466

ORDER STAYING EXECUTION OF SENTENCE AND FIXING BAIL

ARTHUR A. BUSCH
(P-33872)
Prosecuting Attorney
900 S. Saginaw Street
Flint, Michigan 48502
(810) 257-3232

JEROME F. O'ROURKE
(P-18527)
Attorney for Defendant
727 S. Grand Traverse
Flint, Michigan 48502
(810) 239-3165

At a session of said Court, held at the Courthouse in the City of Flint, in said County and State, on the 5th day of December, A.D., 2000.

PRESENT: HONORABLE GEOFFREY L. NEITHERCUT, CIRCUIT JUDGE

In this matter the parties have stipulated thereto,

IT IS HEREBY ORDERED that the execution of the sentence imposed by the Court in this matter is STAYED pending the defendant's exhaustion of his appellate rights as set forth in the stipulation.

IT IS FURTHER ORDERED that the Bond presently on file with this Court in this case shall continue in force as a Bond on Appeal and the defendant shall be released pending exhaustion of his appellate rights as set forth in the stipulation but further conditioned upon his immediate appearance before this Court upon final disposition of the appellate procedures.

IT IS FURTHER ORDERED that the defendant may leave the State of Michigan provided that he keeps the court advised of his residence address at all times.

GEOFFREY L. NEITHERCUT
P-25466
Circuit Judge
Dated December 5, 2000

Jerome F. O'Rourke
Attorney for Defendant

Court of Appeals, State of Michigan

ORDER

People of MI v Scott Louis Zahn		Mark J. Cavanagh Presiding Judge
Docket No.	231542	Kathleen Jansen
LC No.	97-001183-FH	Henry William Saad Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

Judge Cavanagh would grant the application for leave to appeal.

[Seal] Mark J Cavanagh

A true copy entered and certified by Carl L. Gromek, Chief Clerk, on

January 29, 2001 Carl L. Gromek

Chief Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Entered: September 25, 2001

Maura D. Corrigan,
Chief Justice

118620

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SC: 118620
COA: 231542

SCOTT LOUIS ZAHN,

Genesee CC: 97-001183-FH

Defendant-Appellant.

On order of the Court, the application for leave to appeal from the January 29, 2001 decision of the Court of Appeals is considered, and it is DENIED because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh, J., would remand to the Court of Appeals as on leave granted.

[Seal]

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 25 2001

Corbin R Davis
Clerk

Supreme Court, U.S.
FILED
FEB 7 2002

No. 01-1023

In The

Supreme Court of the United States

SCOTT ZAHN,

Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,

Respondent.

On Petition For Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

ARTHUR A. BUSCH, Prosecutor

JOHN C. SCHLINKER,
Deputy Chief Prosecutor
Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court re-evaluate the warrant requirement of the Fourth Amendment.

2. Whether Petitioner's Fourteenth Amendment due process rights were violated when the State of Michigan took jurisdiction based on criminal acts committed in Michigan even though Petitioner never physically entered Michigan.

3. Whether law enforcement agents "created" jurisdiction in Michigan in violation of Petitioner's Fourteenth Amendment due process rights.

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STATEMENT OF THE CASE

Our esteemed brother counsel, Mr. O'Rourke, fairly states the facts of the case. During the course of an investigation conducted by the Flint Area Narcotics Group (FANG), James Hall was enlisted to work as a police agent. Hall had been in the drug trafficking business in Michigan prior to cooperating with FANG. He had known Petitioner for several years. Petitioner served as his drug supplier. Petitioner had been shipping drugs to Michigan for several years. Consistent with their established past practice, Hall and Petitioner used the same "code words," method of contact, payment and shipment as employed in the instant case.

On February 18, 1997, Hall, in Michigan, telephoned Petitioner, in Florida, in order to purchase cocaine. Hall asked if they could "do lunch," code words indicating Hall wanted to buy cocaine. Down payment of $3,000 was requested and sent. A second phone call solidified delivery details. Cocaine was sent from Petitioner, in Florida, addressed to Jane Hoelzer, a pseudonym the two men agreed upon to facilitate their transactions, at 2220 East Court, Apartment 2, Flint, Michigan. A third Florida-to-Michigan phone call confirmed receipt of the down payment. Shipment of the cocaine was scheduled for next day delivery by noon.

FANG Sergeant Allan McLeod was surveilling 2220 East Court the next day when a Federal Express delivery person approached with a package. Armed with knowledge of all the above, McLeod, without first obtaining a

search warrant, seized and searched the package and found the cocaine Hall had ordered.

ARGUMENT

I. This Court should grant Petitioner's writ of *certiorari* limited to re-evaluating the warrant requirement of the Fourth Amendment.

This Honorable Court should grant Petitioner's writ of *certiorari* in order to right the wayward course of Fourth Amendment jurisprudence. Thomas Jefferson expressed his desire that our nation have a Bill of Rights clear to the average citizen "without the aid of sophisms."[1] Instead, despite an original intent clear in historical context and unambiguous language, this Court reduced the Fourth Amendment to a linguistic riddle and prompted legal writers to observe that this Court "simply has made a mess of search and seizure law"[2] and even sharper criticisim: "The Fourth Amendment today is an embarrassment."[3] Petitioner's writ is an appropriate vehicle to drive the Fourth Amendment down its intended road of reasonableness and grant Mr. Jefferson's wish.

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[1] Jefferson, Thomas, *Writings*, The Library of America (1984), p. 915.

[2] Wassertstrom and Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19, 20 (1988).

[3] Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994).

The original intent of the drafters of the Fourth Amendment is clear from history. The framers wanted simply to prohibit the use of general warrants. A framing-era general warrant was based on unparticularized suspicion of criminal activity, a general belief that laws (usually customs laws) were being violated. General warrants directed the arrest of "suspected persons" or a search of "suspicious places."[4]

History reveals no evidence of an intent to require police officers to obtain a warrant before conducting a reasonable search. Many factors support this historical perspective. The common law of the framing era, for example, permitted warrantless arrests and searches.[5] No warrant was required to search ships pursuant to some statutes.[6] In Colonial America, prior to adoption of the Fourth Amendment,

> [m]ost jurisdictions instituted general searches to collect taxes . . . capture felons, or find stolen merchandise. . . . Conversely, although specific warrants existed in legal manuals, they were rare before 1750, thereby indicating that they were not the intended constitutional successor to the general warrant.[7]

"Reasonable" searches were the intended successor to the general warrant. Even practical historical considerations

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[4] Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 n. 12.

[5] *Id.* at 576.

[6] *Id.* at 570.

[7] *Encyclopedia of the American Constitution*, 2d ed. (2000) p. 1098.

such as locating a magistrate in order to issue a warrant prior to conducting a search argue for the proposition.

The Fourth Amendment text likewise conveys no intent to require a warrant before conducting a reasonable search or seizure. The Fourth Amendment consists of two independent clauses. Distilled to its essence the Fourth Amendment states that searches and seizures must be reasonable and general warrants forbidden. On its face, the Fourth Amendment does not require issuance of a warrant prior to conducting a reasonable search or seizure.

Only arbitrary reasoning and creative interpretations of framing-era history continue to support this Court's current application of the Fourth Amendment. Consider, in *Harris v. United States*, 331 U.S. 145, 155 (1947), this Court held that "we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris* concluded that a five-hour search of a four-room apartment, incident to arrest, was reasonable and, therefore, not in violation of the Fourth Amendment. Thirteen months later, this Court held that no warrant was required to arrest a man federal agents observed operating an illegal still, but curiously a search warrant was required to seize the still. *Trupiano v. United States*, 334 U.S. 699, 705 (1948). With no reference to historical authority, *Trupiano* declared that:

> [t]o provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial process wherever possible.

Id. Later that same year, this Court continued its revision of framing-era history, holding that a "search without a warrant demands exceptional circumstances." *McDonald v. United States,* 335 U.S. 451, 454 (1948). This Court emphasized that:

> [a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

Id. at 455-56. A curious conclusion considering fifty years or more would pass from adoption of the Fourth Amendment until the formation of the modern police force.[8]

Two years later, the fog lifted and this Court had clear historical vision, stating that: "it was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required." *United States v. Rabinowitz,* 339 U.S. 56, 60 (1950). *Rabinowitz* approved of an hour-and-a-half search of a desk, safe, and file cabinets incident to lawful arrest. *Id.* at 59. A similar reading of the Fourth Amendment was voiced in *Elkin v. United States,* 364 U.S. 206, 222 (1960), where this Court observed that "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."

Cognizant of its self-inflicted lack of integrity in the area of Fourth Amendment law, *Chimel v. California,* 395 U.S. 752 (1969), acknowledged that:

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[8] Friedman, *A History of American Law,* 2d ed. (1985) p. 287.

> [t]he decisions of this Court bearing upon [the Fourth Amendment] have been far from consistent, as even the most cursory review makes evident.

Id. at 755. And instead of correcting the recognized inconsistency and relying on framing-era history and the unambiguous language of the Fourth Amendment, *Chimel* held that "searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant." *Id.* Respondent submits *Chimel*, at best, is an example of what Justice Cardozo observed years earlier: that a court sometimes must stand firmly "by the errors of our brethren of the week before, whether [it relished] them or not."[9]

Despite this rainbow of precedent, or perhaps because of it, this Court should grant Petitioner's writ of *certiorari* in order to establish that reasonable searches or seizures, conducted without a warrant are not a per se violation of the Fourth Amendment. Where, as here, a police officer is armed with knowledge approaching near certainty that contraband drugs will be uncovered in a package, a search should be permissible simply because it is reasonable. This Court has approved warrantless searches, in part, based on an officer's ability to smell marijuana. *United States v. Jones*, 469 U.S. 478, 482 (1985). And this Court impliedly approved a warrantless seizure of luggage based on a dog signaling drugs have been detected in luggage. *United States v. Place*, 462 U.S. 696, 699 (1983). Surely, Sgt. McLeod's evidence had more bite than a dog's bark.

---

[9] Cardozo, *The Nature of the Judicial Process* (1921) p. 150.

The numerous exceptions this Court has created to justify its general rule that a warrant is required prior to conducting a search is itself evidence of the questionable viability of the general rule. For example, detaining and searching a suspect based only on "reasonable suspicion" requires no warrant. *Terry v. Ohio*, 392 U.S. 1 (1968). No warrant is required to search garbage placed outside the curtilage of a private home. *California v. Greenwood*, 486 U.S. 35 (1988). No warrant is required when probable cause exists to believe a car contains contraband. *Carroll v. United States*, 267 U.S. 132 (1925). No warrant is required to search containers within a car when probable cause exists to believe contraband is in the container. *Ross v. United States*, 456 U.S. 798, 800 (1982); *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). And no warrant is required when consent to search is granted. *Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973). Petitioner relies on *United States v. Van Leeuwen*, 397 U.S. 249, 253 (1970), but even there this Court held it was reasonable to seize first-class mail for 29 hours without a warrant based solely on a government agent's *suspicion* that first-class mail contained contraband coins. This Court created over twenty exceptions to the warrant requirement.[10] The anticipated federalization of airport security may well necessitate the broadest exception to date. It is time for the exceptions to swallow the ill-conceived rule.

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[10] Exceptions to the warrant requirement are collected in Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception Poised To Swallow the Warrant Preference Rule*, 32 Har. C.R.-C.L.L. Rev. 529, 530 n. 10 (1997).

Petitioner's writ of *certiorari* raises fundamental Fourth Amendment issues. Particularly since the events of September 11, 2001, this nation is prepared to embrace the wisdom of the clear and unambiguous standard the framers intended for our mutual welfare and safety. As Cardozo taught, "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[11] The jurisprudential and public policy implications are of the highest order and consistent with this Court's Rule 10(c). Petitioner's writ of *certiorari* should be granted, limited to the question of re-evaluating the warrant requirement of the Fourth Amendment.

II. Petitioner's Fourteenth Amendment due process rights were not violated when the State of Michigan took jurisdiction based on criminal acts committed in Michigan even though Petitioner never physically entered Michigan.

Respondent strongly disputes Petitioner's assertion that as a result of Petitioner's actions no "detrimental effect" occurred in Michigan. Delivery of fifty grams of cocaine into Michigan is, in and of itself, a "detrimental effect" in Michigan and Michigan "has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." *United States v. Mendenhall*, 446 U.S. 544, 561.

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[11] Cardozo, *id.* at 66.

It is undisputed that Petitioner telephoned Michigan and arranged for the delivery of fifty grams of cocaine to Michigan. It is a settled rule that:

> [a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect. . . .

Strassheim v. Daily, 221 U.S. 280, 285 (1911). *Strassheim* held that a state properly obtained jurisdiction, where a crime had sufficient and direct repercussions within the state, even though defendant never entered the state.

The rule of *Strassheim* is still good law. For example, the Ninth Circuit recently held that federal jurisdiction was proper when the crime, or part of the crime, occurred within the United States. Defendant, a citizen and resident of Italy, was convicted of mailing child pornography from Italy to an undercover officer in the United States. Defendant's

> mailing of child pornography was a continuing offense, so that part of the offense was committed in the United States as his letters traveled through the mail and were delivered to their destination, and [the Ninth Circuit] reject[ed defendant's] . . . argument that the crime was complete at the time the letter was deposited in the mail in Italy.

United States v. Moncini, 882 F.2d 401, 403 (9th Cir. 1989). The Eleventh Circuit held that when an individual's criminal acts directly violate the peace, tranquility and laws of a state, the state may prosecute that individual. *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991). The Third Circuit has

expanded the reach of federal jurisdiction in the area of drug smuggling. The requirement that an act be done in the United States is not a necessity.

> The purpose of these provisions is to halt smugglers before they introduce their dangerous wares into and distribute them in this country. A jurisdictional requirement that an effect occur in the United States contravenes this purpose. . . .

United States v. Wright-Baker, 784 F.2d 161, 168 (3rd Cir. 1986). Petitioner's act of delivering cocaine into Michigan had a detrimental effect in Michigan. Jurisdiction to prosecute in Michigan was proper and did not violate his Fourteenth Amendment rights.

III. Law enforcement agents did not "create" jurisdiction in Michigan in violation of Petitioner's Fourteenth Amendment due process rights.

Petitioner's conviction stems from his delivery of over fifty grams of cocaine into Michigan. Petitioner argues state agents contrived to manufacture Michigan jurisdiction and supports his argument with citation to federal authority that holds acts of a government agent performed *solely* for the purpose of creating a connection to interstate commerce cannot give rise to federal jurisdiction. Each of these cases is significantly distinct from the present matter.

The cases upon which Petitioner relies deal with whether the crimes had a sufficient nexus to interstate commerce to provide federal jurisdiction. Only where the interstate aspect of defendant's criminal conduct was created by a law enforcement agent *solely* for the purpose of

obtaining jurisdiction have courts held jurisdiction was contrived and therefore improper. *United States v. Coates*, 949 F.2d 104, 106 (4th Cir. 1991); *see also United States v. Brantley*, 777 F.2d 159, 161-63 (4th Cir. 1985) (unnecessary movement of equipment and alcohol through interstate commerce by government agents to create gambling club where defendants' illegal activity occurred wholly within South Carolina); *United States v. Archer*, 486 F.2d 670, 681-82 (2nd Cir. 1973) (unnecessary interstate telephone call placed by government agent). In *United States v. Garrett*, 716 F.2d 257 (5th Cir. 1983), federal agents had a pre-existing out-of-state presence in California and defendant telephoned the agents from Texas seeking money as part of his illegal operations there. Even though the only connection to California was the government agents' presence, the Fifth Circuit held that the interstate commerce element of defendant's criminal conduct "was not *solely* furnished by government agents [to obtain jurisdiction] and . . . the government did not attempt to contrive jurisdiction." *Id.* at 267.

In the present matter, police officers took no action solely for the purpose of creating jurisdiction in Michigan. To the contrary, Petitioner's ongoing criminal enterprise of delivering cocaine to Hall in Michigan created jurisdiction. Hall contacted Petitioner in his usual manner, placing another order to buy cocaine. Petitioner purposefully made telephone calls to Michigan to arrange delivery and request payment. Petitioner delivered over fifty grams of cocaine to Michigan through an overnight delivery courier.

Significantly, law enforcement authorities created no artificial contacts with Michigan in order to obtain jurisdiction over Petitioner's criminal activity. No state agent traveled out of Michigan to seek to draw Petitioner's criminal activity into the state, nor did anyone contrive a contact that did not already exist. Petitioner merely continued his drug trafficking activity into Michigan and was caught. Petitioner's suggestion that the state somehow manufactured jurisdiction over Petitioner's illegal act is unsupported in law or the record. Michigan has jurisdiction to enforce its criminal laws against such criminal invasions.

Respectfully submitted,

Dated: February 7, 2002

Genesee County Prosecutor Arthur A. Busch
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